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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 FLOYD WALLACE,  
9 Plaintiff,

10 vs.

11 LAS VEGAS METROPOLITAN POLICE  
12 DEPARTMENT; STATE OF NEVADA;  
13 CHRISTIAN TORRES; JASON  
14 SHOEMAKER; CORY MCCORMICK and  
15 DOES 1 to 50, inclusive,

16 Defendants.

Case Number:  
2:23-cv-00809-APG-NJK

**DEFENDANTS OFC. TORRES,  
OFC. SHOEMAKER AND  
OFC. MCCORMICK'S  
MOTION TO DISMISS**

16 Defendants Christopher<sup>1</sup> Torres, Jason Shoemaker and Cory McCormick, by and  
17 through their attorney of record, Marquis Aurbach, hereby file their Motion to Dismiss. This  
18 Motion is made and based upon the Memorandum of Points & Authorities, the pleadings  
19 and papers on file herein and any oral argument allowed at the time of hearing.

20 Dated this 1<sup>st</sup> day of September, 2023.

21 MARQUIS AURBACH

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28 <sup>1</sup> The caption incorrectly identifies Officer Torres as "Christian".

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## **MEMORANDUM OF POINTS & AUTHORITIES**

## I. INTRODUCTION

3 Defendants Torres, Shoemaker, and McCormick are Las Vegas Metropolitan Police  
4 Department (“LVMPD”) officers (collectively “Defendant Officers”). On May 10, 2023,  
5 plaintiff Floyd Wallace (“Wallace”) covered his face with a mask, travelled to an LVMPD  
6 substation, and began filming inside a restricted area. Wallace’s intent was to draw attention  
7 to himself and provoke a police encounter. When the Defendant Officers detained Wallace  
8 to investigate his suspicious behavior, Wallace initially refused to identify himself and  
9 argued the officers were violating his First Amendment rights. The Defendant Officers  
10 arrested Wallace and took him to jail. The district attorney did not pursue the charges.

11 On May 24, 2023, Wallace filed his Compliant. (ECF No. 1-1) Initially, Wallace  
12 only served defendant Las Vegas Metropolitan Police Department (“LVMPD”). LVMPD  
13 filed its Motion to Dismiss on July 17, 2017. (ECF No. 8) On August 14, 2023, Wallace  
14 served the Defendant Officers. The Defendant Officers now file their Motion to Dismiss.  
15 Although many of the officers’ arguments mirror those raised in LVMPD’s Motion to  
16 Dismiss, the officers also raise their qualified immunity defense. As set forth below, all  
17 Wallace’s claims must be dismissed.

## II. BACKGROUND

## A. WALLACE'S FACTS.

## 1. The Complaint.

21 According to Wallace’s Complaint, on May 10, 2023, he went to LVMPD’s Spring  
22 Valley Command Substation to record police officers. (ECF No. 1-1 at ¶17). Wallace  
23 covered his face with a mask and positioned himself at a gate with signs clearly prohibiting  
24 public access. (*Id.* at ¶¶17, 33). Wallace then began filming arriving police vehicles. (*Id.* at  
25 ¶¶18-19). A plain-clothed officer approached Wallace and “asked Plaintiff what he was  
26 doing.” (*Id.* at 19). Wallace ignored the officer and returned to a public sidewalk. (*Id.* at  
27 ¶22).

1 Once on the sidewalk, Wallace several officers contacted Wallace. (*Id.* at ¶¶24-25).  
 2 An officer approached Wallace with a drawn gun, directed Wallace to the front of a police  
 3 car, and handcuffed him. (*Id.* at ¶¶24-27). Wallace was told he was being detained on  
 4 “reasonable suspicion” because video surveillance showed him trying to enter a gate not  
 5 open to the public. (*Id.* at ¶27). As the officers frisked Wallace for weapons, he “assert[ed]  
 6 his right not to have his wallet searched . . . and asked for supervisor.” (*Id.* at ¶¶29-32).  
 7 Wallace refused to provide his identity. (*Id.* at ¶32). When the officers threatened Wallace  
 8 with arrest, Wallace finally “provide[d] his name and birthday under threat of arrest.” (*Id.* at  
 9 ¶35). Wallace claims the officers racially profiled him, accused him of being a terrorist, and  
 10 a possible auto thief. (*Id.* at ¶¶35-41). Eventually, Wallace was arrested for “attempted  
 11 trespassing.” (*Id.* at ¶46). Wallace was transported to jail and released with a citation. (*Id.* at  
 12 ¶48).

13 **2. Wallace’s videos.**

14 Wallace videotaped the subject encounter on two devices. Although not referenced  
 15 in his Complaint, Wallace has requested this Court take judicial notice of his videos in other  
 16 filings and represented the videos are “true and correct” recordings of his arrest. (ECF No.  
 17 23 at 3:15-20<sup>2</sup>).

18 Wallace’s video shows him recording an LVMPD officer’s private vehicle driving  
 19 into a restricted area. (Video #1 at 6:45). The officer exits his vehicle and tells Wallace the  
 20 area is restricted. (*Id.* at 7:00). Wallace never responds, walks right up to the gate and lingers  
 21 for a few moments, and then turns and runs back to the sidewalk. (*Id.* at 7:36-8:00). At the  
 22 sidewalk, Wallace stops and waits to see if the officer is following him. When he sees other  
 23 officers walking and driving towards him, he says to himself, “Okay, they are coming.  
 24 They’re coming” (*Id.* at 8:40). He then turns and begins to walk away from the approaching  
 25 officers despite their orders to “Stop! Stop Police!”

26 \_\_\_\_\_  
 27 <sup>2</sup>See <https://www.youtube.com/watch?v=W2wPORHfYlc> (“Video #1, Exhibit A)

28 [https://www.youtube.com/watch?v=sN\\_WGQTAQk](https://www.youtube.com/watch?v=sN_WGQTAQk) (Video #2, Ex. A)

1       One officer approaches Wallace on foot with his firearm drawn at the low-ready  
 2 position (i.e., not pointed at Wallace). Wallace says “You gotta gun pointed at me?” (*Id.* at  
 3 8:50 and 8:56). The officer orders Wallace to the front of the car, and Wallace ignores the  
 4 command and says he will only comply if the firearm is put away. (*Id.* at 9:00-9:22).  
 5 Wallace is eventually placed in front of the police car where he refuses the officers’ requests  
 6 to identify himself for over three minutes claiming “federal law trumps state law.” (*Id.* at  
 7 10:18-13:39). Wallace refuses to provide any other identifiers and continues to obstruct. (*Id.*  
 8 13:39-16:40). He tells the officers his suspicious activity is his way of expressing his First  
 9 Amendment rights and that “everyone has their own way of doing it.” (*Id.* at 17:29-40).  
 10 During the stop, the officers discover that Wallace has a warrant from a different state. (*Id.*  
 11 at 18:00-11).

12       **3. Wallace’s Background.**

13       Wallace is a First Amendment auditor. (ECF No. 1 at ¶43, Video #1 at 25:07). First  
 14 Amendment audits are a social movement that involve photographing or filming from a  
 15 public space to test constitutional rights, particularly the right to photograph and video  
 16 record in a public space. If the encounter results in an actual or perceived violation of the  
 17 auditor’s First Amendment rights, the video is posted on YouTube, and the auditor files suit.  
 18 Auditors are purposefully confrontational and provocative. *See* Video #1; *see also*, *Brown v.*  
 19 *Basznianyn*, 2023 WL3098982, \*2 (D. Az. Mar. 29, 2023).

20       Since filing this lawsuit, Wallace admits “I have been . . . illegally jailed three times  
 21 in the last 30 days.” (ECF No. 31 at 2:5). Prior to this lawsuit, Wallace filed an almost  
 22 identical lawsuit in Texas. *See Wallace v. Taylor*, 2023 WL 2964418 (5th Cir. 2023). In that  
 23 case, Wallace, in 2021, went to the Tomball (Texas) Police Department and began “creeping  
 24 around a police tower” and filming the parking lot with his phone and body worn camera.  
 25 When officers approached him, he “bolted.” *Id.* at \*1 (5th Cir. 2023). When the officers  
 26 attempted to investigate, Wallace refused to provide identification and protested that the  
 27 officers were violating his rights. *Id.* Eventually, Wallace “[i]n hopes of avoiding arrest,  
 28 Wallace verbally provided his name, birthday, and address.” *Id.* The officers arrested

1 Wallace for evading a police officer and failing to identify himself. *Id.* All of the charges  
 2 except the evading charge were dropped because “there was not sufficient probable cause to  
 3 support the charge.” *Id.*

4 Wallace sued the officers and the police department, alleging false arrest,  
 5 unreasonable search, First Amendment retaliation, malicious prosecution, and a *Monell*  
 6 claim. *Id.* at \*2. The district court denied the officers’ qualified immunity request as  
 7 “premature.” The Fifth Circuit reversed, finding the officers “had reasonable suspicion to  
 8 lawfully detain Wallace”, had the right to search him after he refused to identify himself,  
 9 and that the officers were entitled to qualified immunity on the malicious prosecution claim.  
 10 *Id.* at \*4-6.

11 **B. WALLACE’S CLAIMS FOR RELIEF.**

12 Wallace’s Complaint alleges the following claims for relief:

- 13 • **First Cause of Action:** 42 U.S.C. § 1983 claims for false arrest and excessive force  
     against defendants Torres, Shoemaker, and McCormick.
- 14 • **Second Cause of Action:** 42 U.S.C. § 1983 “and equivalent rights under the Nevada  
     state constitution” for equal protection violations against defendants Torres,  
     Shoemaker, and McCormick.
- 15 • **Third Cause of Action:** 42 U.S.C. § 1983 “and equivalent rights under the Nevada  
     state constitution” for free speech retaliation.
- 16 • **Fourth Cause of Action:** 42 U.S.C. § 1983 *Monell*<sup>3</sup> and Supervisory Liability  
     against LVMPD.
- 17 • **Fifth Cause of Action:** 42 U.S.C. § 1981 for intentionally discriminating against  
     Wallace “because of his race and political affiliation and viewpoints” against Torres,  
     Shoemaker, and McCormick.
- 18 • **Sixth Cause of Action:** State law assault against all defendants.
- 19 • **Seventh Cause of Action:** State law battery against all defendants.

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 28 <sup>3</sup> *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

- 1     • **Eighth Cause of Action:** State law false arrest and imprisonment against all
- 2       defendants.
- 3     • **Ninth Cause of Action:** State law invasion of privacy claim against all defendants.
- 4     • **Tenth Cause of Action:** State law negligence claim against all defendants.

5           On July 17, 2023, LVMPD filed its Motion to Dismiss. (ECF No. 8). That motion is  
 6 fully briefed and pending. Thus, this Motion only involves the claims against the individual  
 7 officers.

8 **III. LEGAL STANDARDS**

9     **A. MOTION TO DISMISS STANDARDS.**

10           Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for  
 11 failure to state a claim upon which relief may be granted. Dismissal for failure to state a  
 12 claim is a question of law, *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 641 (9th  
 13 Cir. 1989), and is appropriate when a “plaintiff can prove no set of facts in support of his  
 14 claim which would entitle him to relief.” *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th  
 15 Cir. 1990) (quoting *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir. 1986)). The  
 16 Supreme Court has addressed the minimum standards a complaint must meet to withstand a  
 17 motion to dismiss under FRCP 12(b)(6), when measured against the pleading requirements  
 18 set by FRCP 8(a)(2). “While a complaint attacked by Rule 12(b)(6) motion to dismiss does  
 19 not need detailed factual allegations...a plaintiff is obligated to provide the ‘grounds’ of his  
 20 ‘entitle[ment] to relief’ [under Rule 8(a)(2), it] requires more than labels and conclusions,  
 21 and a formulaic recitation of the elements of a cause of action will not do...” *Bell Atlantic*  
 22 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting FRCP 8; first set of original brackets  
 23 in original). The Court extended the pleading requirements articulated in *Twombly*, an anti-  
 24 trust case, to all cases. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). As a result,  
 25 “[f]actual allegations must be enough to raise a right to relief above the speculative  
 26 level...on the assumption that all the allegations in the complaint are true (even if doubtful  
 27 in fact).” *Id.*

1 To satisfy FRCP 8(a)(2), a plaintiff must plead “enough facts to state a claim to relief  
 2 that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility  
 3 when the plaintiff pleads factual content that allows the court to draw the reasonable  
 4 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677-78.  
 5 “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it  
 6 ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.*  
 7 While a court must accept all allegations as true, that tenant “is inapplicable to legal  
 8 conclusions. Threadbare recitals of the elements of a cause of action, supported by mere  
 9 conclusory statements, do not suffice.” *Id.* Ultimately, Rule 8 “does not unlock the doors of  
 10 discovery for a plaintiff armed with nothing more than mere conclusions.” *Id.* Dismissal is  
 11 proper where there is either a “lack of a cognizable legal theory” or “the absence of  
 12 sufficient facts alleged under a cognizable legal theory.” *Balisteri v. Pacifica Police  
 Department*, 901 F.2d 696, 699 (9th Cir. 1990).

14 As a general rule, “a district court may not consider any material beyond the  
 15 pleadings in ruling on a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688  
 16 (9th Cir. 2001). An exception exists if the evidence’s “authenticity . . . is not contested” and  
 17 “the plaintiff’s complaint necessarily relies” on them.” *Id.* (citation omitted). Here, Wallace  
 18 has relied upon his videos (attached as Exhibit A) in other pleadings and verified their  
 19 authenticity. (ECF No. 23 at 3:15-20).

20 **B. QUALIFIED IMMUNITY.**

21 Section 1983 is not itself a source of substantive rights, but merely the procedural  
 22 vehicle by which to vindicate federal rights elsewhere conferred. *See Albright v. Oliver*, 510  
 23 U.S. 266, 271 (1994). To make out a prima facie case under § 1983, a plaintiff must show  
 24 that a defendant: (1) acted under color of law, and (2) deprived the plaintiff of a  
 25 constitutional right. *See Borunda v. Richmond*, 885 F.2d 1384, 1391 (9th Cir. 1989). The  
 26 Detectives do not dispute that they acted under color of law. Therefore, the task of this court  
 27 is to determine whether the Detectives violated the Constitution. *See Albright*, 510 U.S. at  
 28 271. In addition, the Detectives have raised the affirmative defense of qualified immunity.

1 A defendant in a § 1983 action is entitled to qualified immunity from damages for  
 2 civil liability if his conduct did not violate clearly established statutory or constitutional  
 3 rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800,  
 4 818 (1982). The Supreme Court has often stressed the importance of deciding qualified  
 5 immunity “at the earliest possible stage in litigation” in order to preserve the doctrine’s  
 6 status as a true “immunity from suit rather than a mere defense to liability.” *Hunter v.*  
 7 *Bryant*, 502 U.S. 224, 227 (1991). “In determining whether an officer is entitled to qualified  
 8 immunity, [a court] consider[s] (1) whether there has been a violation of a constitutional  
 9 right; and (2) whether that right was clearly established at the time of the officer’s alleged  
 10 misconduct.” *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014) (citation omitted).  
 11 Consequently, at summary judgment, a court can “only” deny an officer qualified immunity  
 12 in a § 1983 action “if (1) the facts alleged, taken in the light most favorable to the party  
 13 asserting injury, show that the officer’s conduct violated a constitutional right, and (2) the  
 14 right at issue was clearly established at the time of the incident such that a reasonable officer  
 15 would have understood [his] conduct to be unlawful in that situation.” *Torres v. City of*  
 16 *Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

17 **IV. LEGAL ARGUMENT**

18 **A. WALLACE’S FOURTH AMENDMENT AND STATE LAW FALSE  
 19 ARREST CLAIMS FAIL AS A MATTER OF LAW (FIRST AND EIGHTH  
 COA).**

20 Wallace alleges the Defendant Officers detained him without reasonable suspicion  
 21 and arrested him without probable cause. (ECF No. 1-1 at ¶53)

22 **1. Reasonable suspicion and false arrest law.**

23 ***Reasonable suspicion to detain***

24 A *Terry* stop is a brief, minimally intrusive, investigatory detention. *Terry v. Ohio*,  
 25 392 U.S. 1 (1968). Although a *Terry* stop is a “seizure” under the Fourth Amendment, it is  
 26 nevertheless lawful provided that the police officers has reasonable suspicion “that criminal  
 27 activity may be afoot.” *Id.* at 30; *United States v. Johnson*, 581 F.3d 994, 999 (9th Cir.  
 28 2009). Reasonable suspicion exists where, “in light of the totality of the circumstances, the

1 officer had ‘a particularized and objective basis for suspecting the particular person stopped  
 2 of criminal activity.’ *United States v. Berber-Tinoco*, 510 F.3d 1083, 1087 (9th Cir. 2007)  
 3 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). During a *Terry* stop, a law  
 4 enforcement officer “may ask the detainee a moderate number of questions to determine his  
 5 identify and to try to obtain information confirming or dispelling the officer’s suspicions”  
 6 without *Mirandizing* the detainee. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *see also Wallace*, 2023 WL 2964418, \*3-4 (reasonable suspicion existed to detain and probable  
 7 cause existed to arrest Wallace when he was filming outside a Texas police station and  
 8 avoiding the police).

10 ***Probable cause to arrest***

11 A claim for false arrest is cognizable pursuant to § 1983 as a violation of the Fourth  
 12 Amendment when the arrest was without probable cause or other justification. *Dubner v.*  
*13 City and Cnty. of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001). To determine whether  
 14 an officer has probable cause at the time of an arrest, a court considers “whether at that  
 15 moment the facts and circumstances within [the officers’] knowledge . . . were sufficient to  
 16 warrant a prudent man in believing that the petitioner had committed or was committing an  
 17 offense.” *Edgerly v. City and Cnty. of San Francisco*, 599 F.3d 946, 953-54 (9th Cir. 2010)  
 18 (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Probable cause requires “only a probability or  
 19 substantial chance of criminal activity, not an actual showing of such activity” and “is not a  
 20 high bar.” *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018). In Nevada, probable cause  
 21 can be based on “slight evidence.” *Sheriff, Clark Cnty. v. Badillo*, 600 P.2d 221, 222 (Nev.  
 22 1979) (finding probable cause existed even though witness’s identification was “in direct  
 23 conflict with that of another witness”). Because the probable cause standard is objective,  
 24 probable cause supports an arrest so long as the arresting officers had probable cause to  
 25 arrest for any criminal offense, regardless of their stated reason for the arrest. *Devenpeck v.*  
*26 Alford*, 543 U.S. 146, 153-55 (2004). When the underlying facts claimed to support probable  
 27 cause are not in dispute, whether those facts constitute probable cause is an issue of law. *See*  
*28 Ornelas v. United States*, 517 U.S. 690, 696-97 (1996).

1       “The Constitution does not guarantee that only the guilty will be arrested.” *Olsen v.*  
 2 *Henderson*, 2014 WL 806315, \*5 (Feb. 27, 2014) (citing *Baker v. McCollan*, 443 U.S. 137,  
 3 144 (1979)). The eventual disposition of the charges is immaterial to a court’s probable  
 4 cause determination as a conviction requires a higher burden of proof than is required to  
 5 show probable cause. *See, e.g., Peschel v. City of Missoula*, 686 F.Supp.2d 1107, 1121 (D.  
 6 Mont. 2009) (citing *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). The probable cause  
 7 analysis is the same whether under federal law or Nevada state law. *See Marschall v. City of*  
 8 *Carson*, 86 Nev. 107, 110, 464 P.2d 494 (1970).

9                   **2. The Defendant Officers lawfully detained and arrested Wallace.**

10       First, the Defendant Officers had reasonable suspicion to detain Wallace to  
 11 investigate his suspicious behavior. Wallace admits he was wearing a mask, acting  
 12 suspiciously by following police officer vehicles entering an area prohibited to the public,  
 13 filming inside the prohibited area, and initially refusing to explain his actions to the officers.  
 14 Any reasonable officer would be concerned regarding Wallace’s behavior and, at a  
 15 minimum, investigate it. *See, e.g., Wallace*, at \*3. In *Dave v. Laird*, the Southern District of  
 16 Texas examined a similar case where a plaintiff was filming a “public breezeway” behind a  
 17 police building and a dead-end alley where officers parked their police vehicles. 2021 WL  
 18 7367084, \*3-7 (S.D. Tex. Nov. 30, 2021) When officers confronted the plaintiff, he, like  
 19 Wallace, responded in a hostile manner. The district court dismissed plaintiff’s false arrest  
 20 claim, concluding that reasonable suspicion existed to detain because plaintiff filming where  
 21 police officers parked their vehicles “would likely cause suspicion” and “a reasonable  
 22 person filming in this area would know that their actions might cause legitimate worry or  
 23 even fear on the part of [police officers] who depend on the security of their building and  
 24 integrity of their vehicles for their safety.” *Id.* at \*15-17. *See also, Turner v. Lieutenant*  
 25 *Driver*, 848 F.3d 678, 692 (5th Cir. 2017) (reasonable to detain individual filming police  
 26 station from a public sidewalk as police can “take into account the location of the suspicious  
 27 conduct and the degree of the potential danger being investigated.”)

1       In short, the Defendant Officers clearly had reasonable suspicion to detain and  
 2 investigate Wallace's behavior. At a minimum, there is no clearly established law  
 3 prohibiting the officers' detention, and the Defendant Officers are entitled to qualified  
 4 immunity on this claim.

5       Second, the Defendant Officers had probable cause to arrest Wallace. The officers  
 6 cited Wallace for "attempted trespass." Nev. Rev. Stat. § 207.200(1) makes it a  
 7 misdemeanor for "any person, under circumstances not amounting to a burglary . . . [to go]  
 8 upon the land or into any building of another *with intent to vex or annoy* the owner or  
 9 occupant thereof, or to commit any unlawful act." (Emphasis added.) It is undisputed that  
 10 Wallace approached a closed off area that was prohibited to the public, began filming  
 11 officers entering the area, and then fled when confronted. A reasonable officer could easily  
 12 conclude that probable cause existed that Wallace went onto the property intending to  
 13 commit a lawful act.

14       In addition, as stated above, probable cause can exist for a crime not charged. *See*  
 15 *Devenpeck*, 543 U.S. at 153-55 (Because the probable cause standard is objective, probable  
 16 cause supports an arrest so long as the arresting officers had probable cause to arrest for any  
 17 criminal offense, regardless of their stated reason for the arrest). Under Nev. Rev. Stat.  
 18 § 197.190, it is obstruction under Nevada law to "impede" and/or prolong an investigation.  
 19 *See Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1146-47 (9th Cir. 2012). Nevada district  
 20 courts have held that an individual is obstructing when the individual is "given several  
 21 opportunities to comply with Defendants' orders" but fails to do so. *Kelly v. Las Vegas*  
 22 *Metro. Police Dep't.*, 2014 WL 3725927, \*6 (July 25, 2014). Wallace admits (and his video  
 23 establishes) that he impeded the officers' investigation by failing to identify himself for over  
 24 three minutes after being asked to do so. *See Hibbel v. Sixth Judicial Dist. Court of Nev.*,  
 25 542 U.S. 177, 187-88 (2004) (principles of *Terry* permit a State to require a suspect to  
 26 disclose his name during a *Terry* stop). Therefore, at a minimum, probable cause also  
 27 existed to arrest Wallace for obstruction.

1 At a minimum, there is no clearly established law establishing a lack of probable  
 2 cause under similar circumstances.

3 **B. WALLACE HAS FAILED TO STATE A CLAIM UPON WHICH  
 4 RELIEF CAN BE GRANTED FOR UNREASONABLE SEARCH AND  
 5 SEIZURE OF PROPERTY (FIRST COA).**

6 Wallace alleges the officers unreasonably searched and seized his property. The  
 7 Complaint alleges Wallace was “searched and transported to Clark County Jail.” (Compl. at  
 8 ¶48). Under *Terry*, an officer may pat down a detained person who they reasonably believe  
 9 may be armed and dangerous. 392 U.S. at 27. This brief search is to allow officers to  
 10 conduct investigations without fear of violence. *Adams v. Williams*, 407 U.S. 143, 146  
 11 (1972). Further, when a suspect is arrested, a police officer may conduct a warrantless  
 12 search incident to an arrest of both the arrested person and the area within his control.  
 13 *Chimel v. California*, 395 U.S. 752, 763 (1969) *abrogated on other grounds by Arizona v.*  
 14 *Grant*, 556 U.S. 332 (2009). Here, Wallace was patted down when he was detained, and  
 15 briefly searched pursuant to his lawful arrest. This claim fails as a matter of law.

16 **C. WALLACE HAS FAILED TO STATE A CLAIM UPON WHICH  
 17 RELIEF CAN BE GRANTED FOR EXCESSIVE FORCE (FIRST COA).**

18 Wallace’s First Cause of Action also alleges excessive force. The only force  
 19 referenced by the Complaint (beyond the lawful search of Wallace’s person) is that an  
 20 officer drew his gun while approaching Wallace.

21 Courts approach excessive force claims in three stages. *See Espinosa v. City & Cty.*  
 22 *of S.F.*, 598 F.3d 528, 537 (9th Cir. 2010); *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).  
 23 First, the court assesses the severity of the intrusion on the individual’s Fourth Amendment  
 24 rights by evaluating the type and amount of force inflicted. *Id.* Then, the court evaluates the  
 25 government interests by assessing the severity of the crime; whether the suspect posed an  
 26 immediate threat to the officer or public’s safety; and whether the suspect was resisting or  
 27 attempting to escape. *Graham*, 490 U.S. at 396-97. Third, the court “balance[s] the gravity  
 28 of the intrusion on the individual against the government’s need for that intrusion.” *Miller v.*  
*Clark County*, 340 F.3d 959, 964 (9th Cir.2003). According to the Ninth Circuit, the

1 drawing of a weapon becomes unreasonable when the “police officer [] terrorizes a civilian  
 2 by brandishing a cocked gun in front of that civilian’s face” while investigating a minor  
 3 crime against a citizen. *Robinson v. Solano Cty.*, 278 F.3d 1007, 1123 (9th Cir. 2002); *see*  
 4 *also Thompson v. Rahr*, 885 F.3d 582, 586 (9th Cir. 2018) (“pointing guns at persons who  
 5 are compliant and present no danger” is unreasonable).

6 Here, Wallace alleges an officer approached him “with a gun drawn.” (ECF No. 1-1  
 7 at ¶24.) Wallace’s video confirms that an officer approached him with his firearm at the  
 8 low-ready position (i.e., not pointed at Wallace). By simply approaching Wallace with his  
 9 gun drawn in the low-ready, the officer did not use excessive force. Further, Wallace’s video  
 10 confirms that the officers did not terrorize him. Also, Wallace was initially resistant and  
 11 uncooperative. Once Wallace became cooperative, the weapon was immediately holstered.  
 12 As the officer explained to Wallace on the video, his gun was drawn due to Wallace’s  
 13 suspicious behavior and the fact he was ignoring the officer’s initial commands. At a  
 14 minimum, the officer is entitled to qualified immunity as no clearly established law prohibits  
 15 the drawing of a firearm in similar circumstances.

16 **D. WALLACE’S FOURTEENTH AMENDMENT EQUAL PROTECTION  
 17 CLAIM MUST BE DISMISSED (SECOND COA).**

18 Wallace alleges the officers violated his Fourteenth Amendment equal protection  
 19 rights because they arrested him due to the “color of his skin, his position as a member of  
 20 the press, and due to his political affiliation.” (ECF No. 1 at ¶57).

21 To state a § 1983 claim for violation of the Equal Protection Clause of the Fourteenth  
 22 Amendment, a plaintiff must allege that the violation was committed with an intent or  
 23 purpose to discriminate based upon plaintiff’s membership in a protected class. *Lee v. City*  
*24 of Los Angeles*, 250 F.3d 668, 686-87 (9th Cir. 2001). To prevail, the plaintiff must show  
 25 “that enforcement had a discriminatory effect and the police were motivated for a  
 26 discriminatory purpose.” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 920 (9th Cir. 2012).  
 27 Where the challenged governmental policy is “facially neutral,” proof of its disproportionate  
 28 impact on an identifiable group can satisfy the intent requirement only if it tends to show

1 that some invidious or discriminatory purpose underlies the policy. *Id.* (citations omitted). If  
 2 the action does not involve a suspect classification, a plaintiff may establish an equal  
 3 protection claim showing that similarly situated individuals were intentionally treated  
 4 differently without a rational relationship to a legitimate state purpose. *Village of*  
 5 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To state an equal protection claim under  
 6 this theory, a plaintiff must allege that (1) the plaintiff is a member of an identifiable class;  
 7 (2) the plaintiff was intentionally treated differently from others similarly situated; and  
 8 (3) there is no rational basis for the difference in treatment. *Id.*

9 Here, Wallace alleges officers intentionally discriminated against him based on the  
 10 color of his skin, his position as a member of the press, and due to his political affiliation  
 11 and viewpoints. First, Wallace's Complaint admits he never told the officers he was a  
 12 member of the press or about his political affiliations. Thus, the officers could not have  
 13 discriminated against him as a member of the press or due to his political views as he never  
 14 made these facts known. *See Iqbal*, 556 U.S. at 678 ("threadbare recitals of the elements of a  
 15 cause of action, supported by mere conclusory statements, do not suffice."). Further, the  
 16 press is not a protected class. Second, Wallace's racial profiling claim cannot meet the final  
 17 two prongs established in the *Willowbrook* case. The Complaint does not allege Wallace was  
 18 intentionally treated differently from others that are similarly situated as him and that there  
 19 was no rational basis for the difference in treatment. Specifically, Wallace has failed to  
 20 allege facts suggesting that LVMPD does not detain and arrest non-African American  
 21 individuals who put on masks, travel to police substations and film police vehicles, and then  
 22 obstruct investigations. This claim fails as a matter of law.

23 **E. WALLACE'S FIRST AMENDMENT CLAIM MUST BE DISMISSED**  
 24 **(THIRD COA).**

25 Wallace claims the officers violated his First Amendment rights by retaliating  
 26 against him "for his speech, including his verbal protests and criticisms of the Defendants'  
 27 actions in investigating, detaining, and arresting Plaintiff without any basis . . ." (Compl. at  
 28 ¶61). Because Wallace admits he never verbally protested or criticized the officers, his claim

1 is really that they arrested him for filming police activity. The Ninth Circuit has held there is  
 2 a First Amendment right to film the police. *See Fordyce v. City of Seattle*, 55 F.3d 436, 439  
 3 (9th Cir. 1995); *Askins v. U.S. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018)  
 4 (There is a right to record law enforcement officers engaged in the exercise of their official  
 5 duties in public places.) The right to film “may be subject to reasonable time, place, and  
 6 manner restrictions.” *Gilk v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). The Ninth Circuit has  
 7 held that “[r]easonable, content-neutral, time, place, or manner restrictions, on the other  
 8 hand, are subject to ‘an intermediate level of scrutiny.’” *Jacobson v. U.S. Dep’t Homeland*  
 9 *Sec.*, 882 F.3d 878, 882 (9th Cir. 2018) (citation omitted). Restrictions in a nonpublic forum  
 10 must only be “reasonable in light of the purpose served by the forum and viewpoint neutral.”  
 11 *Id.* Finally, to prevail on a First Amendment retaliation claim in an arrest context, a plaintiff  
 12 also “must plead and prove the absence of probable cause.” *See Nieves v. Bartlett*, 139 S.Ct.  
 13 1715, 1725 (2019); *Hartman v. Moore*, 547 U.S. 250, 252 (2006) (holding that want of  
 14 probable cause to support the underlying criminal charge must be alleged and proven for a  
 15 First Amendment retaliation violation be actionable).

16 Here, Wallace was not arrested for filming, but rather for attempted trespass. As set  
 17 forth above, probable cause existed for the arrest rendering this claim untenable under  
 18 *Nieves* and *Hartman*. Assuming Wallace’s arrest was a pretextual arrest to punish him for  
 19 filming, the claim would still fail. Wallace admits he was attempting to film inside a non-  
 20 public, gate-guarded area that was off limits to the public. It is reasonable for security  
 21 reasons to restrict individuals from filming officers leaving and entering police stations.  
 22 Thus, Wallace has not pled facts sufficient to state a claim against the Defendant Officers  
 23 for a First Amendment violation.

24 **F. WALLACE’S 42 U.S.C. § 1981 CLAIM MUST BE DISMISSED (FIFTH  
 25 COA).**

26 Wallace’s Fifth Cause of Action alleges the officers discriminated against him  
 27 because of his race and political affiliations. (Compl. at ¶¶72-75) 42 U.S.C. § 1981 prohibits  
 28 discrimination in the making and enforcement of contracts by reason of race, national origin,

1 or ancestry. *See* 42 U.S.C. § 1981. The Ninth Circuit recently issued an opinion indicating  
 2 that while § 1981 claims establish substantive rights that a state actor may violate, it does  
 3 not contain a remedy against that state actor for such violations. *Yoshikawa v. Seguirant*, 74  
 4 F.4th 1042, 1047 (9th Cir. 2023) (en banc). Therefore, this claim must be dismissed.

5 **G. WALLACE'S STATE LAW CLAIMS MUST BE DISMISSED.**

6 **1. Wallace's assault and battery claims must be dismissed for failure**  
**to state a claim upon which relief can be granted (Sixth and Seventh**  
**COA).**

7 Wallace's state law assault and battery claim is the same as his 42 U.S.C. § 1983  
 8 excessive force claim. He alleges excessive force was used by pointing the gun at him and  
 9 then taking him into custody. First, any touching of Wallace was privileged as it was  
 10 pursuant to a valid arrest, and he does not allege any facts suggesting unnecessary force was  
 11 used to search him or handcuff him. Second, the assault claim involving the pointing of the  
 12 gun fails for the same reasons Wallace's Fourth Amendment excessive force claim fails.  
 13 *Ramirez v. City of Reno*, 925 F.Supp. 681, 691 (D.Nev. 1996) ("The standard for common-  
 14 law assault and battery by a police officer mirrors the federal civil rights law standard. . .").  
 15

16 **2. Wallace's false arrest and false imprisonment must be dismissed**  
**for failure to state a claim upon which relief can be granted (Eighth**  
**COA).**

17 The false arrest/imprisonment claim is identical to Wallace's Fourth Amendment  
 18 unreasonable search and seizure claim. The probable cause analysis is the same whether  
 19 under federal law or Nevada state law. *See Marschall*, 464 P.2d 494. *Badillo*, 600 P.2d at  
 20 223 (probable cause only requires "slight evidence"). In addition, the officers are protected  
 21 by discretionary immunity under Nev. Rev. Stat. § 41.032. *See Gonzalez v. Las Vegas Metro*  
 22 *Police Dep't.*, No. 61120, 2013 WL 7158415, \*2-3 (Nev. Nov. 21, 2013) (holding that an  
 23 officer's decision to arrest based on a matched description in a facially valid warrant was  
 24 entitled to discretionary immunity).

25 In *Gonzalez v. Las Vegas Metro Police Dep't.*, the Nevada Supreme Court evaluated  
 26 the application of the discretionary immunity doctrine in evaluating the officer's decision to  
 27 arrest and detain a suspect. In *Gonzalez*, the court found "LVMPD's decision to arrest or  
 28

1 detain Gonzalez based on a warrant was part of a policy consideration that required analysis  
 2 of multiple social, economic, efficiency, and planning concerns including public safety.”  
 3 *Gonzalez v. Las Vegas Metro Police Dep’t.*, 61120, 2013 WL 7158415, at \*3 (2013) (citing  
 4 *Martinez v. Maruszczak*, 123 Nev. 433, 446-47, 168 P.3d 720, 729 (2007)); *see also Ortega*  
 5 *v. Reyna*, 953 P.2d 18, 23 (Nev. 1998) (concluding that no civil liability attached to a state  
 6 trooper’s decision to arrest a driver for allegedly refusing to sign a traffic ticket because the  
 7 decision to do so was a discretionary decision requiring personal deliberation and judgment  
 8 and, thus, entitled to immunity under NRS 41.032(2); *Coty v. Washoe Cty.*, 839 P.2d 97, 100  
 9 n.7 (Nev. 1992) (“the decision of whether to make an arrest is largely discretionary.”).

10 **3. Wallace’s invasion of privacy claim must be dismissed for failure**  
**to state a claim upon which relief can be granted (Ninth COA).**

11 “Nevada’s common law recognizes the tort of invasion of privacy for unreasonable  
 12 intrusion upon the seclusion of another. The purpose of the tort is to provide redress for  
 13 intrusion into a person’s reasonable expectation of privacy . . .” *Clark Cty. School Dist. v.*  
 14 *Las Vegas Review-Journal*, 429 P.3d 313, 320 (Nev. 2018). The tort of invasion of privacy  
 15 embraces four different tort actions: “(a) unreasonable intrusion upon the seclusion of  
 16 another; or (b) appropriation of the other’s name or likeness; or (c) unreasonable publicity  
 17 given to the other’s private life; or (d) publicity that unreasonably places the other in a false  
 18 light before the public.” Restatement (Second) of Torts § 652A (1977); *PETA v. Bobby*  
 19 *Berosini, Ltd.*, 895 P.2d 1269, 1278 (Nev. 1995).

20 Wallace alleges the officers committed this tort by searching him. However, as set  
 21 forth above, the search was lawful as it was a basic search pursuant to a lawful arrest.

22 **4. Wallace’s negligence claim must be dismissed for failure to state a**  
**claim upon which relief can be granted (Tenth COA).**

23 Wallace alleges the officers conducted a negligent investigation that led to his arrest.  
 24 Therefore, if the arrest was lawful, this claim fails. In addition, the officers are immune  
 25 pursuant to Nev. Rev. Stat. § 41.032. *See Pittman v. Lower Court Counseling*, 871 P.2d 953,  
 26 956 (1994) (“the nature of an investigation is inherently discretionary.”); *Foster v. Washoe*  
 27 *Cty.*, 964 P.2d 788, 792 (1998).

## V. CONCLUSION

Based upon the foregoing, the Defendant Officers request they be dismissed from this lawsuit.

Dated this 1<sup>st</sup> day of September, 2023.

## MARQUIS AURBACH

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing **DEFENDANTS OFC. TORRES, OFC. SHOEMAKER AND OFC. MCCORMICK'S MOTION TO DISMISS** with the Clerk of the Court for the United States District Court by using the court's CM/ECF system on the 1<sup>st</sup> day of September, 2023.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Floyd Wallace  
1613 Leopard Lane  
College Station, TX 77840  
*Pro Per*

s/Sherri Mong  
an employee of Marquis Aurbach

## Exhibit A

<https://www.youtube.com/watch?v=W2wPORHfYlc>  
("Video #1")

Las Vegas Metropolitan  
Police Department, et al.  
adv.

Floyd Wallace

YouTube Videos

14687-464  
DVD